LIBRARY
SUPREME COURT, U. S.

Supreme Court, U. S.
FILED
JAN 17 1975
MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1974

No. 74-876

IOANA DRAGANESCU, et al.,

Petitioners

vs.

FIRST NATIONAL BANK OF HOLLYWOOD,

Respondent

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals

For The Fifth Circuit

John R. Vintilla
550 Hanna Building
Cleveland, Ohio 44115
Attorney for Petitioners

TABLE OF CONTENTS

Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statutory Provision Involved	4
Statement of the Case	4
Reasons for Granting the Writ	8, 13
Conclusion	18
Appendix	
Pre-Trial Order of District Court	19
Opinion, Court of Appeals	23
Exhibit A-1, Plaintiffs' Motion For Protective Order	33
Exhibit A-2, Plaintiffs' Motion For Protective Order	35
Exhibit A-3, Plaintiffs' Motion For Protective Order	38
Exhibit II, Plaintiffs' Motion To Amend Pre-Trial Order	39
Order-Court of Appeals Denying Rehearing	43

TABLE OF AUTHORITIES

CASES

Brotherhood of R. R. Trainmen v. Virginia, 377 U. S. 1 — 9

French v. Hall, 119 U. S. 152, 154 — 17

Harmar Drive In Theatre v. Warner Bros. Pictures, 239 F.2d 555, 559 — 18

Schware v. Board of Examiners, 353 U. S. 247, 8

OTHER

Wise, Legal Ethics, Opinions of Committee On Professional Ethics of American Bar Association, 201, — 17

32 Fla. Stat. Ann. 127 (Supp 1974), Code of Professional Responsibility, DR 5-101 (B) and DR 5-102 (A) — 3,4

28 U. S. C. Section 1254 (1) — 2

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1974
No.

IOANA DRAGANESCU, et al.,
Petitioners

-vs-

FIRST NATIONAL BANK OF HOLLYWOOD,
Respondent

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

The petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on October 7, 1974.

OPINIONS BELOW

The opinions of the District Court

and of the Court of Appeals are unreported. They appear in the Appendix hereto.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on October 7, 1974. A timely petition for rehearing was denied on November 6, 1974. This court's jurisdiction is invoked under 28 U.S.C., Section 1254(1).

QUESTIONS PRESENTED

The Court of Appeals affirmed the order of the District Court which construed Rule 5-101(B) and Rule 5-102(A) of the Florida Code of Professional Responsibility as barring Chief Counsel for the petitioners from active participation in the trial of the cause and as authorizing the lawyer's removal as attorney of record.

1. Whether the District Court could summarily remove petitioners' lawyer as

attorney of record upon learning at a pre-trial conference that the lawyer may give testimony at the trial as a corroborating witness, and, where the lawyer, who was unable to attend and therefore requested a postponement of the conference, had no prior knowledge that an issue would be made about the probable testimony, and he was afforded no opportunity to be heard with regard thereto?

2. May the Code of Professional Responsibility of Florida be applied to exclude a lawyer uniquely available and specially qualified to represent non-resident alien litigants where there has been no showing that the adverse party would be prejudiced or that a just resolution of the controversy would be jeopardized by the probable corroborating testimony of counsel?

STATUTORY PROVISION INVOLVED

32 Fla. Stat. Ann. 127 (Supp 1974), Code of Professional Responsibility, DR 5-101(B) and DR 5-102(A), appear in the Opinion of the Court of Appeals in the Appendix.

STATEMENT OF THE CASE

The petitioners, who are citizens and residents of Romania, filed suit against the First National Bank of Hollywood, Florida, and a former employee for misrepresentation in connection with the preparation of, and the negligent failure to prepare a will. The case was filed in the United States District Court for the Southern District of Florida at Fort Lauderdale. The action was undertaken on behalf of the petitioners by undersigned counsel in view of his long time friendship with the petitioners' decedents, his personal acquaintance with one of the principal petitioners, and as a result of his representa-

tion of the interests of Romanian nationals in the United States for the past fifteen years. The representation of the petitioners in this case is on a contingent fee basis, as has been the situation in all other matters involving these nationals.

The name of John T. Carlon, Jr., Esquire, of Fort Lauderdale, Florida, was filed of record in compliance with the order of the District Court and pursuant to the local rule of the court, 10(D)2, which required the attorney for the plaintiffs (the undersigned), a non-resident of Florida, to designate a member of the Bar of the District Court who resides in the district, upon whom notice and papers may be served.

John R. Vintilla has been engaged in the active practice of law for twenty-seven years. For fourteen years, he has confined his practice to the representation of citizens and residents of Romania in the protec-

tion and preservation of their right to property in the United States, consisting principally of claims to decedents' estates and related matters. This practice has brought him before state and federal courts throughout our country. He is admitted to, and has practiced before this court in such cases. See Goldstein v Cox, 396 U.S. 471, Gorun v Fall, 393 U.S. 398, and Danila v Dobrea, 391 U.S. 949.

A pre-trial conference was held in the case on November 26, 1973, at which the District Judge declared that John R. Vintilla could no longer appear as counsel of record for the plaintiffs and that he must withdraw as such from the case. John R. Vintilla did not attend the pre-trial conference because he was scheduled to enter a hospital for surgery on November 28, 1973. A motion to continue the pre-trial conference was duly filed for this reason, but it

was not acted upon. The transcript of the pre-trial conference was entered as a pre-trial order. Thereafter, the plaintiffs filed a motion to amend the order insofar as it prohibited John R. Vintilla from acting on behalf of the plaintiffs as their legal counsel of record. The motion was denied.

The District Judge ruled that John R. Vintilla could not represent the plaintiffs in this cause because of the possibility that he may give corroborating testimony at the trial on their behalf. The court found support for its ruling in the Florida Code of Professional Responsibility, Canon 5 (DR. 5 -101),(B), (DR 5-102 A), 32 Fla. Ann. 127 (Supp. 1974). The order was appealed to the Court of Appeals after the District Court refused to modify it to permit subject counsel to continue to act in the case. The lower court affirmed the decision

of the District Court. The petition for a rehearing was denied by the Court of Appeals.

REASONS FOR GRANTING THE WRIT

1. THE RIGHT TO LEGAL COUNSEL SPECIALLY QUALIFIED AND UNIQUELY AVAILABLE IS AN INTEGRAL PART OF THE CONSTITUTIONAL SAFEGUARDS ACCORDED TO THESE PETITIONERS BY THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

The force and validity of the petitioners contention can best be evaluated in the context of the declarations of this Court in matters involving a lawyer. Mr. Justice Frankfurter, in his concurring opinion in Schware v Board of Examiners, 353 U. S. 247, stated:

> "One does not have to inhale the self-adulatory bombast of after-dinner speeches to affirm that all the interests of man that are comprised under the constitutional guarantees given to 'life, liberty and property' are in the professional keeping of lawyers. It is a fair characterization of the lawyer's

responsibilty in our society that he stands 'as a shield', to quote Devlin, J., 'in defense of right and to ward off wrong' ".

Mr. Justice Black stated in Brotherhood of R. R. Trainmen v Virginia, 377 U. S. 1:

> " . . laymen cannot be expected to know how to protect their rights when dealing with practiced and carefully counseled adversaries, . . ."

A careful review of the record in this case will disclose readily the necessity for the services of a lawyer especially equipped by reason of experience and background, and with a unique desire to protect and preserve the rights granted by our laws to citizens of a foreign state. It should not be difficult to understand that the engagement of a lawyer for a single instance, in a vigorously contested action, on a contingent fee basis, would be hard to come by, to say the least.

The enormity of the work which has been required just to keep this case active, in and of itself, would cause a fair and impartial mind to conclude that qualifications and an attitude not usually found in the ordinary practitioner must be summoned in order to persist in the cause on a contingent fee arrangement. The strategy of our adversaries has been one of using every tactic, ostensibly appropriate, to harass the complainants and their counsel. For example, they have noticed the taking of the plaintiffs' oral depositions in Florida several times, and persisted in this objective, although fully informed of the impossibility of compliance with such a request, and advised that the foreign complainants have no information to impart on the subject of the action since the operative facts occurred in Florida. On the other hand, the offer to make certain material witnesses available for interroga-

tion in Florida and Ohio, was rejected by the defendants. See Exhibits A 1,2,and 3 of Plaintiffs' Motion For Protective Order in the Appendix. Despite this situation, the defendants filed a certificate of non-attendance, and moved for sanctions against the petitioners. This conduct caused the District Judge to comment, unnecessarily, and unjustifiably, we believe, that "The plaintiffs' attorney have, throughout this case, been dilatory in their compliance with the Federal Rules of Civil Procedure, the Local Rules of Procedure and the orders of the court. Plaintiff is hereby placed on notice that the court will henceforth hold the plaintiffs to botn the letter and the spirit of any rules or orders of this court." (sic) These remarks on the part of the court prompted local counsel to write to chief counsel for the petitioners and state, as follows:

"I frankly find this Order extremely dis-

> turbing since it appears I am being given a label of being 'dilatory' in a matter over which I neither have control nor from which I expect to receive compensation. In addition, the time that I had devoted to this matter has gotten out of hand, and, while I am aware of your prior promise that I would not be expected to try the case or embarrassed in any manner by the affiliation, it appears that such embarrassment has indeed already occurred. I therefore, do not feel that I can further accommodate you in this matter, and request that you make arrangements to secure other counsel immediately in this matter and arrange for their substitution." See comment in opinion of Court of Appeals.

There have been others who refused to affiliate with this cause before and after the appearance of the above-named counsel with a motive far less convincing. The circumstances hereinabove related, coupled with the problem of communicating with clients who are not conversant with our language, in a land with customs and procedures totally alien to our ways, could present obstacles of serious magnitude to the usual practitioner who is confronted for the first time

with such a representation. We submit that the exclusion of a lawyer experienced in such a representation as has been sanctioned in this case will lead inescapably to the extinguishment of the rights of the petitioners.

2. THE DECISION BELOW RAISES A SIGNIFICANT AND RECURRING PROBLEM CONCERNING THE RIGHTS AND THE ROLE OF A LAWYER IN THE ADMINISTRATION OF JUSTICE.

It is not uncommon for a judge and lawyers to look with disfavor upon the appearance of out of state counsel in their bailiwick. The arbitrary action of the District Judge in the exclusion of counsel selected by the petitioners, and the superficial treatment of the issue by the Court of Appeals, reflect the importance of the problem. The District Court entered the order in the absence of interested counsel without any notice to him that the court would be asked to rule on the question, and with no opportunity afforded him to be heard con-

cerning it. This unusually drastic and grossly unfair action and conduct were of no consequence to the Court of Appeals. Moreover, the Court of Appeals misapprehended the facts as they appear in the record, and disregarded the established principles on the subject, including the decision of this court.

The salutary purpose and objectives of the Code of Ethics are not to be disputed. The proper application of the provisions of the Code as a factor in the administration of justice is drawn in issue in this cause. The exclusion of special counsel upon the mere suggestion of impropriety without due consideration of the particular circumstances involved and the effect upon the rights of the clients is untenable. The haste and manner in which the question was determined reveal the unconstitutionality of the action. A cursory reading of the decision of the Court of Appeals would have it appear to be correct. However, a careful study

of the record requires a serious dissent. The Court accepted the District Judge's characterization of the probable testimony of plaintiffs counsel as that of a "material witness", although this is unsupported by the record. The Court of Appeals in its opinion stated that the plaintiffs' attorney, John R. Vintilla, " appears to be the only person who spoke with the bank's lawyer regarding the exact terms and time requirements of the proposed will." Yet, in the same paragraph of the opinion, just three lines above, the court states: "After Victoria's first visit to the bank ." If this party went to the bank on behalf of the testatrix to commission it to "draw up a will", as recited by the court, it is implicit in that statement, we believe, that there may have been some discussion of testimonial value at that time which would make the person an important witness. In addition, there is nothing of record from which it may

be inferred that John R. Vintilla is "the only person" who could give relevant testimony on the issues. The petitioners pre-trial statement lists three individuals other than plaintiffs' counsel as witnesses. In Exhibit II attached to plaintiffs' Motion to Amend Pre-Trial Order, it is stated(see Appendix):

> "If you will accept that I will testify as summarized herein, and that it will corroborate the essential parts of the testimony of three other witnesses, . . ."

There appears in Exhibit A-2 of plaintiffs Motion For Protective Order (Appendix), the following:

> "If you are truly interested in gaining access to all relevant information about our cause, I can refer you to several people in Florida who would enlighten you about the facts. I can assure you that once you have taken the depositions of the individuals here in the United States, you will comprehend fully the merits of cause".

The author of Wise, Legal Ethics, Opinions of Committee on Professional Ethics of

American Bar Association, page 201, recites an opinion which was given by the committee pertaining to our problem. In the question before it the committee held that it is not always improper for an attorney to try a case in which his partner is a material witness, and stated relevant to our issue, " . . that the possibility of the witness slanting his testimony is less serious than the injustice to the estate of depriving it of a necessary witness and a specially qualified lawyer." As far back as 1886, this court had occasion to enunciate the rule on this issue in French v Hall, 119 U. S. 152, 154, where it stated:

> " . . There is nothing in the policy of the law, as there is no positive enactment which hinders the attorney of a party prosecuting or defending in a civil action from testifying at the call of his client. In some cases it may be unseemly, especially if counsel is in a position to comment on his own testimony, and the practice, therefore, may very properly be discouraged; but there are cases, also, in which it may be quite import-

> ant, if not necessary, that the testimony should be admitted to prevent injustice or redress wrong".

That which occurred below is best illustrated by the admonishment of Chief Judge Clark in Harmar Drive In Theatre v. Warner Bros. Pictures, 239 F. 2d 555,559, wherein he declared:

> " . . . the danger of using legal ethics to protect monopolists and to harass complainants suggests care and concern lest we go too far."

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Fifth Circuit.

Respectfully submitted,
John R. Vintilla
550 Hanna Building
Cleveland, Ohio 44115

Attorney for Petitioners

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF FLORIDA
No. 72-809-Civ-NCR

IOANA DRAGANESCU, et al.,
Plaintiffs,

vs.

FIRST NATIONAL BANK OF HOLLYWOOD, et al.,
Defendants.

ORDER

Pretrial conference held in this cause on November 26, 1973, counsel for the parties appeared, and proceedings were had as reflected in the regular text attached. Accordingly, it is

ORDERED AND ADJUDGED that the pretrial stipulation of the parties, together with the admissions, stipulations and rulings of the Court, as reflected in these minutes will govern the trial of the cause.

DONE AND ORDERED at Miami, Florida, this 22 day of January, 1974.

NORMAN C. ROETTGER,JR.

United States
District Judge

THE CLERK: Ioana Draganescu v. First National Bank of Hollywood.

THE COURT: Counsel make your appearances for the record.

MR. CARLON: John Carlon for the Plaintiffs.

MR. WEINS: Jack Weins for the defendant First National Bank of Hollywood.

MR. WASSERMAN: Jeffrey Wasserman from Litman & Muchnick, for the defendant James Schweikert.

THE COURT: Gentlemen, I see a number of motions here on matters I wanted to go over.

Mr. Carlon, what is the plaintiffs' theory of recovery in this case?

MR. CARLON: Well, Your Honor, let me preface my remarks stating this: I have not had very much contact with the plaintiffs' attorney. It was my understanding that my appearance was merely to be a token one to satisfy the requirements of the local rule. However, yesterday morning I received a phone call from Mr. Vintilla who, as far as I was concerned, was expected to be here or had expected to be here for the scheduled pretrial conference, and he at that time advised me that he had filed a motion for the face of the file as of yet. It is not in the stipulation, but Mr. Vintilla advised me by telephone within the past, I'll say, two to three weeks, and in his latest motion for a continuance which was filed he has set forth in his affidavit that he intends to be a witness in this case.

I have advised him that I am going to object to that. I have also advised Mr. Carlon that I am going to object to that, and I know counsel for other defendant, I think, objects to that.

MR. WASSERMAN: We certainly will, Your Honor.

THE COURT: I have some great reservations on my own about that, too. I do see it on the pretrial stipulation, plaintiff lists himself as Witness No. 1.

MR. WEINS: Yes, sir.

MR. CARLON: Yes, sir.

THE COURT: That was the next matter I intended to get into, was the fact that he had done that, and his affidavit does indicate he has knowledge of the material facts which are essential to a resolution of the controversy.

Mr. Carlon, there is no way that Mr. Vintilla can represent these people and also be a material witness in the lawsuit. I think you can start preparing yourself for more than a cursory review of the file because you are counsel of record.

MR. CARLON: Yes, sir.

THE COURT: From this point on, I don't think Mr. Vintilla can sign anything except an affidavit in this case. He cannot sign any pleadings and he cannot really appear as counsel of record following that representation on his part.

I see we have a jury case here, gentlemen?

MR. WEINS: Yes, sir.

THE COURT: Requested a jury?

MR. WASSERMAN: Yes, Your Honor. I believe we requested the jury.

MR. CARLON: Judge, may we back up just a moment on the other matter?

Do you wish Mr. Vintilla to withdraw or substitute counsel?

THE COURT: I will just simply order him to withdraw by copy of the transcript of these proceedings which will serve as a pretrial order.

MR. WEINS: In response to your last question, Your Honor, plaintiff requested in his amended complaint a trial by jury.

IOANA DRAGANESCU et al.,
Plaintiffs-Appellants,

v.

FIRST NATIONAL BANK OF HOLLYWOOD et al.,
Defendants-Appellees.

No. 74-2286
Summary Calendar.

United States Court of Appeals,
Fifth Circuit.

Oct. 7, 1974.

Appeal from the United States District Court for the Southern District of Florida.

Before WISDOM, GOLDBERG, and GEE, Circuit Judges.

OPINION - COURT OF APPEALS

GOLDBERG, Circuit Judge:

This diversity case began as a suit by the heirs of Mary Radu, all Romanian nationals and residents, against defendant-appellee First National Bank of Hollywood (the bank) for negligent failure to prepare a will. Plaintiffs-appellants allege that the decedent asked Victoria Vintilla to commission defendants-appellees to draw up a will. After Victoria's first visit to the bank, John R. Vintilla, her brother and an Ohio attorney who specializes in the representation of Romanian emigrees and nationals, called the bank. He appears to be the only person who spoke with the bank's lawyer regarding the exact terms and time requirements of the proposed will.

When Mary Radu died intestate, plaintiffs-appellants hired the same John Vin-

tilla to represent them. Pursuant to Rules of the United States District Court for the Southern District of Florida Vintilla found local co-counsel, and then instituted this action. His fee was dependent on the outcome of the case. In a Pre-Trial Order, Appendix page 2, the district judge ruled that Vintilla could not represent plaintiffs while appearing as a material witness for them. The judge therefore ordered Florida co-counsel to take responsibility for the suit. Plaintiffs ask us to reverse the court's order. We decline to do so.

Since only "final judgments" are appealable, 28 U.S.C. Sec. 1291, this Court must first determine that the removal of counsel in the pre-trial order is "final". In Cohen v. Beneficial Industrial Loan Corp., 1949, 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528, the Supreme Court said that a collateral order - one which did not terminate an ac-

tion - was final and appealable when it finally determined claims separable from rights asserted in the main action, was too independent of the cause itself to require that the appeals court defer consideration until the whole cause could be adjudicated. This Court has applied the Cohen rule to find orders on motions to disqualify counsel appealable.

> As we said in (Tomlinson v. Poller, 5 Cir. 1955, 220 F.2d 308, 311) this is "a matter entirely disconnected with the principal contention of the taxpayers in pending suit," and, "This order constitutes a final decision on that ancillary matter." Here, if the order was in error, the harm resulting therefrom is in the nature of the frustration of a public policy which cannot be avoided or mitigated by any appeal taken after the trial . . . is finally ended.

Tomlinson v. Florida Iron and Metal Inc., 5 Cir. 1961, 291 F.2d 333 at 334. See also Uniweld Products, Inc. v. Union Carbide Corp., 5 Cir. 1967, 385 F.2d 992, 994.[1]

The Florida law which guides us in evaluating the ruling of the trial court is contained in the Code of Professional Responsibility, 32 Fla.Stat.Ann. 127 (Supp. 1974), adopted by the Florida Supreme Court in 1970. The provision falls under the Disciplinary Rules, about which the Florida Court says: "The Disciplinary Rules, unlike

---

[1] In both Uniweld and Florida Iron and Metal Inc. we upheld the finality of the denial of a motion to disqualify counsel. In the present case, we pass on the finality of an order to disqualify. An order erroneously depriving a party of its chosen counsel during the course of the trial would also frustrate public policy in a way which a post-trial appeal could not mitigate.

the Ethical Considerations, are mandatory in character. The Disciplinary Rules state the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action." Id. at 130 (Supp.1974).

Disciplinary Rule DR 5-101(B) reads:

> A lawyer shall not accept employment in contemplated or pending litigation if he knows or it is obvious that he or a lawyer in his firm ought to be called as a witness, except that he may undertake the employment and he or a lawyer in his firm may testify:
>
> (1) If the testimony will relate solely to an uncontested matter.
> (2) If the testimony will relate solely to a matter of formality and there is no reason to believe that substantial evidence will be offered in opposition to the testimony.
> (3) If the testimony will relate solely to the nature and value of legal services rendered in the case by the lawyer or his firm to the client.
> (4) As to any matter, if refusal would work a substantial hardship on the client because of the distinctive value of the lawyer or his firm as counsel in the particular case.

Disciplinary Rule DR 5-102(A) provides:

> If, after undertaking employment in con-

templated or pending litigation, a lawyer learns or it is obvious that he or a lawyer in his firm ought to be called as a witness on behalf of his client, he shall withdraw from the conduct of the trial and his firm, if any, shall not continue representation in the trial, except that he may continue the representation and he or a lawyer in his firm may testify in the circumstances enumerated in DR 5-101(B)(1) through (4).

Although there has been little interpretation of the current provisions,[2] Florida courts have regularly applied the previous incarnation of these provisions.[3] Thus, in

---

[2] In Beavers v. Conner, Fla.Dist.Ct. of App., 3d Dist., 1972, 258 So.2d 330, the court, guided by new provision DR 5-101(B), ruled that the trial court was not in error when it permitted a member of the law firm representing plaintiff to testify. However, the lawyer only testified to matters conceded by the defendant and therefore clearly fell within exception (1) of DR 5-101(B). Even so, the court noted:

> It certainly would appear that, in order not to jeopardize a client's cause of action, the better practice would be for counsel to arrange to have another conduct a trial proceeding when it is apparent that either he or a member of his firm will be required to testify on behalf

In re Estate of Freeman, Fla.Dist.Ct. of App., 3d Dist., 1970, 240 So.2d 656, the court reversed a trial judge who allowed a witness to the testamentary capacity of the deceased to continue as executor's counsel. In Dudley v. Wilson, 1943, 152 Fla. 752, 13 So.2d 145, the Florida Supreme Court upheld the decision of the lower court to prevent plaintiff's counsel from testifying about

---

of his client. Even though we have not found error in permitting the testimony in the instant case, each such situation will have to be scrutinized with utmost care whenever it arises and counsel should be very careful in testifying for a client while handling the trial.
258 So.2d 330 at 332.

[3] Disciplinary Rules DR 5-101 and 5-102 replaced Code of Ethics, rule B, Sec.1, subd. 19, 32 F.S.A. 615 (1967), which read:

Appearance of Lawyer as Witness for his Client. - When a lawyer is a witness for his client, except as to merely formal matters, such as the attestation or custody of an instrument and the like, he should leave the trial of the case to other counsel. Except when essential to the ends of justice, a lawyer should

the nature of the consideration for the conveyance of real property given the deceased party, for whom plaintiff was administrator. See also Millican v. Hunter, Fla.1954, 73 So.2d 58; Hubbard v. Hubbard, Fla.Dist.Ct. of App., 4th Dist., 1970, 233 So.2d 150.

Plaintiffs' claim that removal of their lawyer will work a substantial hardship and that, under exception (4) to 5-101(B), he should therefore be reinstated. They argue that Vintilla is uniquely qualified to represent them because he can speak the Romanian language, knew decedent for many years and has great familiarity with the task of representing Romanians. Moreover, they insist, other lawyers are reluctant to take cases involving Romanians on a contingent fee basis.

---

avoid testifying in court in behalf of his client.

We are not convinced of these claims and do not believe that Vintilla's removal will work a substantial hardship. His knowledge of the Romanian language will be of limited utility since he admits, "(T)he plaintiffs do not have any information to impart which will be of any value to you (a defendant's counsel). All of the operative facts of our cause of action took place in Florida and the witnesses who shall establish them are in the United States." Appendix at 18. In any case, the trial court's order does not bar Vintilla from acting as translator, should the need for a Romanian presence be established. The fact that Vintilla had known decedent for many years may make him a more credible witness on the nature of the will she is alleged to have commissioned, but it is not relevant to actions he would take in his lawyerly capacity. Plaintiffs fail to specify how Vintilla's familiarity

with Romanians bears on the quality of the representation he can give. Finally, they do not demonstrate that the lack of such familiarity makes disinterested counsel unwilling to work on a contingent fee basis.[4]

The only relevant exception to the Florida rule forbidding a material witness to act as counsel arises where a party would otherwise bear a substantial hardship. Plaintiffs have not demonstrated that a removal of counsel in this case would work such a hardship. We therefore affirm the order of the court below.

Affirmed.

---

[4] Mr. Vintilla has noted in a letter to the district judge that local co-counsel desired to withdraw from the case once the judge had appointed the local attorney as counsel of record. Appendix at 22. Of itself, this desire to withdraw by one local counsel does not show that plaintiffs cannot secure alternative counsel.

EXHIBIT A - 1. PLAINTIFFS' MOTION FOR PROTECTIVE ORDER.

June 19, 1973

Mr. Jack F. Weins, Esq.,
Attorney at Law
7th Floor Home Federal Tower
1720 Harrison Street
Hollywood, Florida

Re: Ioana Draganescu, et al., v. First National Bank of Hollywood, et al

Dear Mr. Weins:

Today, I received a copy of the Court's Order dated June 14, 1973, wherein the court decreed, among other things, that we should attempt to reach an agreement concerning the depositions which you seek to take of the plaintiffs. You realize, of course, that it shall not be possible to bring the plaintiffs to the United States because they do not have the money to support the expenses in connection therewith. You are aware, no doubt, of the circumstances of the people, especially the workers and peasant farmers in a country such as Romania. In view thereof, I am open to any suggestions which you may have to solve the dilemma. In the event we are unable to resolve this problem, I shall file a motion for a protective order.I do not believe that the law authorizes the dismissal of an action due to the failure of a party to appear for a deposition when it is made apparent that the non-compliance results from conditions beyond the control of the party. Now that it is evident to all concerned that a cause of action is stated against your client, I believe that we should go to the crux of the litigation and concentrate upon reaching a reasonable settle-

ment of our claim.

I wish to assure you, once again, of my complete cooperation to the end that you may be fully and properly informed of all aspects of this matter.

Very truly yours,

John R. Vintilla

EXHIBIT A-2
PLAINTIFFS' MOTION FOR PROTECTIVE ORDER

July 2, 1973

Jack F. Weins, Esquire
Attorney at Law
Home Federal Tower
P.O. Box 650
Hollywood, Florida 33022

Re: Draganescu v. First National Bank
of Hollywood
Your file 49.232

Dear Mr. Weins:

Your letter of June 27, 1973 has been received.

Of course, there can be no dispute about the proposition that you have the right to take the deposition of the plaintiffs. This right, however, is to be exercised in the light of the circumstances of the particular case. One such circumstance, and an important one, is that the plaintiffs are foreign citizens and residents. Secondly, they are without any funds whatsoever. This is not the first instance in which such a problem arose, and, therefore, the law has provided for such a contingency. I refer you to Rule 28(b) and Rule 29 of the Federal Rules of Civil Procedure.

I can understand your desire to make an expense-free trip and visit to Romania, and, I, for one, would welcome it. You should know that I have represented Romanian nationals in the United States for the past 14 years. There have been occasions where I arranged for other lawyers from the United States to interrogate my clients in Romania. In these

situations, the expenses were ordered paid by the particular estate involved, and in the case of the Public Administrator of Los Angeles County, the expenses were advanced. There would be no problem about your interrogating the plaintiffs since we could stipulate the taking of their depositions, and I would have the authorities make them available and allow us to do so before the proper official in the country. The problem is, where do we find the money for the expenses of such a trip?

We all know the purpose of the rules of discovery under our Federal procedure, and, admittedly, they are salutary ones. You do have the right to "ascertain the other party's position on any relevant issue", and " . . . to gain access to all possible sources of information that may have a bearing upon the action." But, if this is your sole purpose, as a practical matter you would be wasting everyone's time. As I wrote you earlier, the plaintiffs do not have any information to impart which will be of any value to you. All of the operative facts of our cause of action took place in Florida and the witnesses who shall establish them are in the United States. Your statement about my authority to represent the plaintiffs and to file suit is without basis. If this is your only concern, you have no problem. I have represented these people since our decedent died, and, in fact, we are still in litigation with the estate here in Ohio. I have known the decedent and her predeceased husband for many years, and, in fact, I have visited with the decedent and her sister, Ioana Draganescu, in the latter's home in Romania. I am in constant communication with Mrs. Draanescu since I am fully conversant in the

Romanian language.

If you are truly interested in gaining access to all relevant information about our cause, I can refer you to several people in Florida who would enlighten you about the facts. I can assure you that once you have taken the depositions of the individuals here in the United States, you will comprehend fully the merits of our cause.

I do believe that if we can discuss this matter in person and thoroughly, we can reach a just and reasonable settlement. You have my assurance that I shall disclose everything that is relevant and which you should know. This, I believe, should be the first step before you expend any more time and effort. If you are not completely satisfied, we can move from there.

I await your further reply hereto.

Sincerely yours,

John R. Vintilla

EXHIBIT A-3

PLAINTIFFS' MOTION FOR PROTECTIVE ORDER

July 2, 1973

Merle Litman, Esquire
Attorney at Law
Suite 401 Hollywood Federal Building
5950 Washington Street
Hollywood, Florida 33023

Re: Draganescu v. First National Bank
of Hollywood

Dear Sir:

Your letter of June 29th, last, was received after I had written to attorney Jack Weins on the same subject as that of your letter and sent you a copy of same. I believe that that which was directed to attorney Weins is responsive to your letter in full.

I am unable to imagine how your client can benefit from taking the deposition of a party who has no knowledge about the allegations of the Amended Complaint, or in what manner he will be prejudiced in not taking such a deposition. In any event, I shall cooperate to the limits of my ability under the circumstances of this matter. Please advise what, if anything, I can do.

Very truly yours,

John R. Vintilla

PLAINTIFFS' EXHIBIT II
ATTACHED TO MOTION TO AMEND
PRE-TRIAL ORDER

November 6, 1973

Jack F. Weins, Esquire
P.O. Box 650
Hollywood, Florida 33022

Re: Draganescu v. First National Bank
of Hollywood

Dear Mr. Weins:

Today I received your letter of November 5th, last.

Insofar as the questions in the Second Set of Interrorogatories are concerned, the answers are within my personal knowledge since I am the ancillary administrator appointed by the Probate Court of Cuyahoga County, Ohio. The estate here is still under administration, having been delayed in its closing because of an appeal by the domiciliary executor. With regard to the admissions requested by you, you should know that the parties do not have personal knowledge about the statements involved, except insofar as they may have learned from me. Other than admission number 13, all the statements are a matter of public record in Broward County and would be the best evidence. Neither I or my clients can admit the physical or mental incompetency of the decedent since we do not have personal knowledge of those statements.

The relevant and material facts which I would establish are, in summary, as follows: I have known the decedent, Mary Radu, and her predeceased husband, Pete Radu,

ever since 1947. The parties lived in Cleveland (Lakewood, a suburb) and sometime after the death of her husband, Mary Radu moved to Florida. They had no children. Shortly before Mary Radu died, my sister, Victoria Vintilla, visited Mary Radu in Florida at her insistence and request. Mary Radu knew my sister at least as long as she knew me. At the time in issue, my sister was and still is in the travel business. Mrs. Radu wanted my sister to take her to Romania so that she could live there with her sister, Ioana Draganescu. Victoria Vintilla knew Mrs. Draganescu and has visited her in Romania several times. At the time Victoria Vintilla visited Mary Radu in May, 1969, she told her that she wanted to make a will because she did not trust her guardian, Pete Pirvu. In this connection, she requested my sister to see a Mr. James F. Schweikert, a lawyer at the First National Bank of Hollywood with whom she discussed the making of her will leaving her estate to her sister and to nieces and nephews of hers and her husband's in Romania. Victoria Vintilla met Mr. Schweikert and discussed the wishes of Mary Radu with him at the First National Bank of Hollywood. Upon my sister's return to Cleveland and having received her report about her visit with Mary Radu, I telephoned James F. Schweikert at the said Bank in Hollywood concerning Mrs. Radu's will. He admitted that he was requested to prepare the will, but did not do so yet because he had difficulty with some of the names and addresses of the nieces and nephews designated by the testatrix as legatees. I told him to provide in the will that 1/3 would go to her sister, Ioana Draganescu, and gave her address, and the rest to be shared equally by the nieces and nephews of both Mary Radu and

Pete Radu. I told him further that I would locate all the legatees after Mary Radu's death. I urged Mr. Schweikert to attend to the preparation and the execution of the will at once since time was of the essence, and to send me a copy. After learning of the death of Mary Radu, I called Mr. Schweikert to inquire about her will since I had not received a copy from him as promised. I was disturbed to learn from him that he did not get around to making the will and attending to its execution.

The foregoing is the testimony I shall give in this case. Now about the deposition. As you know, I am on a contingent fee basis, and my clients are people without funds. Since it appears that I will have to come to Florida for the trial and pre-trial on the 26th of this month, the cost of two trips in such a short time is prohibitive. If you will accept that I will testify as summarized herein, and that it will corroborate the essential parts of the testimony of three other witnesses, this should be persuasive to convince the defendants to offer a reasonable settlement. With the assurance that serious settlement negotiations would be undertaken in view of the evidence as related by me, I would come to Florida and give my deposition on condition that the defendants shall reimburse me for the expenses in connection therewith in the event that the testimony as alleged herein is substantiated and a settlement agreement is not concluded. You can be assured that my expectations shall be fair and reasonable.

The matter of professional responsibility was very much in my mind in view of the important testimony which I could give. For the past 14 years, I represented Romanian nationals in estate matters throughout the

United States. In view of the specialized knowledge and the familiarity with the peculiar problems of foreign claimants, I have testified on many occasions in the representation of my clients' interests. It was the only way to get important information before the cpurt. The problem which I had is that it is almost impossible to get local counsel in these cases which are usually difficult, especially since it must be on a contingent fee basis. Thus, unless I go forward as the lawyer, even when I must testify, we cannot prevail. As you can see, therefore, these cases are an exception to the usual ones, and, you must agree that every rule has a valid exception. Canon 19 of the Canons of Professional Ethics provides that a lawyer should testify for a client only "when essential to the ends of justice." It is not always improper for an attorney to try a case in which he may have testimony essential to a just determination of the dispute, even though such testimony is favorable to the client. I believe, therefore, that the circumstances of our situation justify an exception to the usual practice. I trust that you and Mr. Litman will be persuaded to my position on this point.

I await your further response hereto at the earliest possible moment.

Sincerely,

John R. Vintilla

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 74-2286

IOANA DRAGANESCU, et al.,
Plaintiffs-Appellants,

v.

FIRST NATIONAL BANK OF HOLLYWOOD, et al.,
Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Florida

ON PETITION FOR REHEARING
(November 6, 1974)

Before WISDOM, GOLDBERG and GEE, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.